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July 23, 2004

**VIA COURIER**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Natek, Inc.  
236 Massachusetts Avenue, NE, Suite 110  
Washington, DC 20002

**RECEIVED**

JUL 23 2004

Federal Communications Commission  
Office of Secretary

**Re: Petition for Rulemaking; In the Matter of Closed Captioning of Video  
Programming—Implementation of Section 305 of the Telecommunications  
Act of 1996: Video Programming Accessibility**

Dear Ms. Dortch:

Please find enclosed for filing the original and nine (9) copies of a Petition for Rulemaking, filed on behalf of Telecommunications for the Deaf, Inc., National Association of the Deaf, Self Help for Hard of Hearing People, Inc., the Association for Late Deafened Adults, and the Deaf and Hard of Hearing Consumer Advocacy Network, in the above-captioned matter. The Petition for Rulemaking seeks to establish additional enforcement mechanisms to better implement the captioning rules and to establish captioning quality standards to ensure high quality and reliable closed captioning.

Please date-stamp the enclosed extra copy of this filing. Should you have any questions please do not hesitate to contact the undersigned at (202) 295-8436.

Respectfully submitted,



Andrew D. Lipman  
Paul O. Gagnier  
Brian M. McDermott

Enclosures

Secretary  
July 23, 2004  
Page 2

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Claude Stout (TDI)  
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Nancy Bloch (NAD)  
Brenda Battat (SHHHP)  
Lois Maroney (ALDA)

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Closed Captioning of Video Programming	)	RM - ____
	)	
Implementation of Section 305 of the	)	
Telecommunications Act of 1996	)	
Video Programming Accessibility	)	

**PETITION FOR RULEMAKING**

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Dated: July 23, 2004

## SUMMARY

Petitioners Telecommunications for the Deaf, Inc., National Association of the Deaf, Self Help for Hard of Hearing People, Inc., the Association for Late Deafened Adults, and the Deaf and Hard of Hearing Consumer Advocacy Network request that the Federal Communications Commission (“Commission”) initiate a rulemaking to establish additional enforcement mechanisms to better implement the captioning rules, and to establish captioning quality standards to ensure high quality and reliable closed captioning.

Closed captioning is critical to deaf and hard of hearing individuals, both for personal safety and with respect to quality of life. Deaf and hard of hearing individuals who rely on closed captioning in order to have access to video programming continue to experience numerous problems with closed captioning. This has resulted in a lack of access to video programming that is contrary to the mandates of Section 713 of the Communications Act of 1934. The Commission’s adoption of the captioning rules was the first step towards increasing the availability of captioning. However, it has become clear that additional enforcement mechanisms are required in order to ensure full implementation of the rules and to increase accountability for noncompliance with the rules. In addition, measures are needed to ensure that the occurrence of technical problems is *minimized* and to ensure that technical problems that do occur are remedied efficiently and expeditiously. The Commission also must adopt quality of service standards in order to ensure that video programming is fully accessible to deaf and hard of hearing individuals.

Specifically, Petitioners request the following:

- The Commission should establish additional compliance and enforcement measures including the creation of an Commission-maintained database with updated contact information for video programming distributors and providers and the creation of a captioning complaint form.

- The Commission should establish compliance reporting requirements and should undertake compliance audits to ensure effective implementation of the captioning requirements and to improve accountability.
- The Commission should revise its complaint rules to require responses to consumer complaints regarding captioning quality issues (and other issues not directly tied to benchmark compliance) within 30 days.
- The Commission should establish fines/penalties for non-compliance with the captioning rules.
- The Commission should require continuous monitoring of captioning by the video programming distributor or provider to ensure that technical problems are remedied promptly and efficiently.
- The Commission should require video programming distributors to reformat edited or compressed captioning.
- The Commission should require that for a program to be considered “captioned” under the existing rules, it must meet minimum standards set by the Commission for completeness, accuracy, readability and synchronicity with the audio portion of the program.
- The Commission should adopt non-technical quality standards to ensure that video programming is “fully accessible” to deaf and hard of hearing individuals.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Closed Captioning and Video Description	)	RM - ____
of Video Programming	)	
	)	
Closed Captioning Quality Standards	)	

**PETITION FOR RULEMAKING**

Telecommunications for the Deaf, Inc. ("TDI"), by its undersigned counsel, National Association of the Deaf ("NAD"), Self Help for Hard of Hearing People, Inc. ("SHHH"), the Association for Late Deafened Adults ("ALDA"), and the Deaf and Hard of Hearing Consumer Advocacy Network ("DHHCAN") (collectively "Petitioners") petition the Federal Communications Commission ("Commission"), pursuant to 47 C.F.R. § 1.401, to initiate a rulemaking to establish additional enforcement mechanisms to better implement the captioning rules, and to establish captioning quality standards to ensure high quality and reliable closed captioning. The Commission should adopt minimum quality of service standards to ensure that deaf and hard of hearing individuals have full access to video programming, regardless of distribution technology, as required by Section 713 of the Communications Act of 1934 ("Section 713").<sup>1</sup>

This Petition will demonstrate that deaf and hard of hearing individuals who rely on closed captioning in order to access video programming continue to experience numerous problems with closed captioning. This has resulted in a lack of access to video programming that is

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<sup>1</sup> 47 U.S.C. § 613(b). Section 713 of the Communications Act of 1934 (47 U.S.C. § 613(b)), which was added to the Communications Act by Section 305 of the Telecommunications Act of 1996, generally requires that video programming be closed captioned to ensure that it is accessible to deaf and hard of hearing individuals.



contrary to the mandates of Section 713. For example, deaf and hard of hearing individuals continue to encounter pervasive technical problems resulting in captioned programming appearing without captions, with garbled and otherwise illegible captions, and programming during which captioning simply disappears (for example, in some cases captions disappear one hour into a movie, a special report on a severe weather event is broadcast without captions by a local TV station, or captioning disappears ten minutes before the climax of a national broadcast program).

As Congress recognized when it adopted the closed captioning mandates set forth in Section 713, closed captioning is vital to deaf and hard of hearing individuals. The Conference Report accompanying the Act states that it is “the goal of the House to ensure that all Americans ultimately have access to video service and programs, particularly as video programming becomes an increasingly important part of the home, school and workplace.”<sup>2</sup> Access to closed captioning is critical to deaf and hard of hearing individuals to assure personal and public safety as well as maintaining quality of life. In its comments on the Commission’s 1996 Notice of Inquiry<sup>3</sup> regarding captioning accessibility, the Boston Chapter of Self Help for Hard of Hearing People poignantly described the critical nature of captioning for deaf and hard of hearing individuals:

Television is such a tremendous and wide-ranging force in American life today. Much of today’s information, from sports to local and national news and to emergency information, is transmitted verbally across television. Ten percent of Americans, the hearing impaired, are denied access to this force, if there is no captioning. Because they cannot hear or hear well enough, they are literally cut off from one of society’s main streams. . . . Communication via language differentiates human beings from all other living creatures. People are social beings and it is through speaking and hearing that one of

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<sup>2</sup> Conf. Rep. No. 104-458, 104<sup>th</sup> Cong., 1d Sess. (1996) at 183-4.

<sup>3</sup> See *Closed Captioning and Video Description of Video Programming*, Notice of Inquiry, MM Docket No. 95-176, FCC 95-484, 11 FCC Rcd 4912 (1996) (“NOI”).

their fundamental needs is fulfilled. Life without verbal communications is isolated, drab, and depressive. Advances in assistive technology for hearing impaired people can make the difference between living in isolation and continuing to be part of the world at large. Captioning is one of these technologies that enabled hearing impaired to lead informed, full and rewarding lives. Hearing loss is not simply an issue of aging. It affects children, young adults, and adults. Captioning is necessary for them to remain an active part of the larger community. Captioning provides them with informational and cultural quality.”<sup>4</sup>

The Commission’s adoption of the captioning rules required by Section 713(b) was the first step towards increasing the availability of captioning.<sup>5</sup> However, based on experience with captioning over the course of the past five years since these rules went into effect, it is clear that additional enforcement mechanisms are required in order to ensure full implementation of the rules and to increase accountability for noncompliance with the rules. In addition, measures are needed (1) to ensure that the occurrence of technical problems is minimized and (2) to ensure that technical problems that do occur are remedied efficiently and expeditiously. The Commission also must adopt quality standards in order to ensure that video programming is fully accessible to deaf and hard of hearing individuals.

## **I. Introduction**

### **A. Interest of Petitioners**

#### **1. Telecommunications for the Deaf, Inc.**

TDI is a national advocacy organization that seeks to promote equal access issues in telecommunications and media for the 28 million Americans who are deaf, hard of hearing, late-

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<sup>4</sup> *Comments of Boston Chapter of Self Help for Hard of Hearing People*, filed January 25, 1996 in response to the Commission’s NOI (MM Docket 95-176).

<sup>5</sup> Section 713(b) and (c) required the Commission to establish regulations and implementation schedules to ensure that video programming is fully accessible through closed captioning. 47 U.S.C. §§ 613(b) and (c).

deafened, or deaf-blind so that they may enjoy the opportunities and benefits of the telecommunications revolution to which they are entitled.<sup>6</sup>

## **2. Deaf and Hard of Hearing Consumer Advocacy Network**

DHHCAN, established in 1993, is a coalition of national organizations of, by, and for the deaf, hard of hearing, late-deafened, and deaf-blind that seeks to protect and expand the rights of individuals who are deaf, hard of hearing, late-deafened, and deaf-blind in education, employment, telecommunications, technology, health care, and community life. The member organizations of DHHCAN include the American Association of the Deaf-Blind (AADB), the American Deafness and Rehabilitation Association (ADARA), the Association of Late-Deafened Adults (ALDA), the American Society for Deaf Children (ASDC), the Conference of Educational Administrators of Schools and Programs for the Deaf (CEASD), Communication Service for the Deaf (CSD), Deaf Seniors of America (DSA), Gallaudet University, Gallaudet University Alumni Association (GUAA), Jewish Deaf Congress (JDC), National Association of the Deaf (NAD), National Black Deaf Advocates (NBDA), National Catholic Office of the Deaf (NCOD), Registry of Interpreters for the Deaf (RID), Telecommunications for the Deaf Inc. (TDI), USA Deaf Sports Federation (USADSF), and The Caption Center/WGBH.

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<sup>6</sup> TDI educates and encourages consumer involvement regarding legal rights to telecommunications accessibility; provides technical assistance and consultation to industry, associations, and individuals; encourages accessible applications of existing and emerging telecommunications and media technologies in all sectors of the community; advises on and promotes the uniformity of standards for telecommunications technologies; works in collaboration with other disability organizations, government, industry, and academia; develops and advocates national policies that support accessibility issues; and publishes *The GA-SK*, a quarterly news magazine, and the annual *Blue Book*, *TDI National Directory & Resource Guide for Equal Access in Telecommunications and Media for People Who Are Deaf, Late-Deafened, Hard-of-Hearing or Deaf-Blind*.

### **3. National Association of the Deaf**

Established in 1880, the NAD is the nation's oldest and largest constituency organization safeguarding the accessibility and civil rights of twenty-eight million deaf, hard of hearing, late deafened, and deaf-blind Americans in a variety of areas, including education, employment, health care, and telecommunications. A private, non-profit organization, the NAD is a dynamic federation of state associations and organizational affiliates and direct members. Primary areas of focus include grassroots advocacy and empowerment, captioned media, deafness-related information and publications, legal rights technical assistance, policy development and research, and youth leadership development. The NAD works closely with deafness related national organizations and is a member of several coalitions representing the interests of deaf, hard of hearing, late deafened, and deaf-blind individuals.

### **4. Self Help for Hard of Hearing People, Inc.**

SHHH is the nation's foremost consumer organization representing people with hearing loss. SHHH's national support network includes an office in the Washington D.C. area, 13 state organizations, and 250 local chapters. The SHHH mission is to open the world of communication to people with hearing loss through information, education, advocacy, and support. SHHH provides cutting edge information to consumers, professionals and family members through their website, [hearingloss.org](http://hearingloss.org), their award-winning publication, Hearing Loss, and hearing accessible national and regional conventions. SHHH impacts accessibility, public policy, research, public awareness, and service delivery related to hearing loss on a national and global level.

### **5. Association for Late Deafened Adults**

Formed in Chicago, Illinois in 1987, ALDA works collaboratively with other organizations around the world serving the needs of late-deafened people. ALDA promotes public and private programs designed to alleviate the problems of late-deafness and for

reintegrating late-deafened adults into all aspects of society. ALDA also provides educational information concerning issues affecting late-deafened adults, as well as advocacy on behalf of, and support for, late-deafened adults and their families and friends.

Petitioners represent most of the advocacy groups and organizations concerned with issues impacting deaf and hard of hearing Americans. Petitioners believe that only by ensuring equal access for all Americans will society benefit from the myriad skills and talents of persons with disabilities.

**B. Captioning Mandates Under Section 713 of the Communications Act and Current Captioning Rules**

**1. Background**

Section 713 of the Communications Act of 1934, as amended, entitled “Video Programming Accessibility,” which was added to the Communications Act by Section 305 of the Telecommunications Act of 1996, generally requires that video programming be closed captioned to ensure that it is accessible to deaf and hard of hearing individuals. Section 713 also required the Commission to adopt and implement regulations to maximize closed captioning of video programming, regardless of the entity that provides the programming to consumers or the category of programming.

Specifically, Section 713(b) required the Commission to adopt rules establishing implementation schedules to ensure that: (1) video programming first published or exhibited after the effective date of the regulations (“new programming”) is “fully accessible” through the provision of closed captions, and (2) that video programming providers or owners maximize the

accessibility of video programming first published or exhibited prior to the effective date of such regulations (“pre-rule programming”) through the provision of closed captions.<sup>7</sup>

In a Report and Order released in August 1997, the Commission established closed captioning rules that included an eight-year transition schedule to phase in closed captioning for “new” non-exempt video programming (for programs first shown on or after January 1, 1998).<sup>8</sup> Pursuant to the Commission’s subsequent *Order on Reconsideration*, as of January 1, 2006, 100% of video programming distributors’ new non-exempt programming must be closed captioned.<sup>9</sup> The Commission established a ten-year transition period for pre-rule programming,<sup>10</sup> requiring that at least 30% of a channel’s pre-rule programming be captioned beginning on January 1, 2003,<sup>11</sup> and 75% of all pre-rule programming delivered to consumers must be captioned beginning on January 1, 2008.<sup>12</sup>

The Commission also included a “no backsliding rule” requiring video programming providers to continue to provide closed captioning at a level substantially the same as the average level they provided during the first six months of 1997, even if that amount of closed captioning would exceed the benchmarks.<sup>13</sup>

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<sup>7</sup> 47 U.S.C. § 613(b).

<sup>8</sup> *Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility*, MM Docket No. 95-176, FCC 97-279, Report and Order, 13 FCC Rcd 3272, 3301 (rel. Aug. 22, 1997) (“*Report and Order*”); 47 C.F.R. § 79.1(e).

<sup>9</sup> *Closed Captioning and Video Description of Video Programming: Implementation of Section 305 of the Telecommunications Act of 1996*, 13 FCC Rcd 19973, FCC 98-236 (rel. Oct. 2, 1998) (“*Order on Reconsideration*”).

<sup>10</sup> “Pre-rule programming” is programming published or exhibited prior to January 1, 1998.

<sup>11</sup> *Order on Reconsideration*, 13 FCC Rcd at 19988.

<sup>12</sup> *Id.* at 19984-19988.

<sup>13</sup> *Id.* at 19983.

## 2. Current Complaint Procedures

With respect to enforcement, the Commission elected to establish a complaint procedure whereby complainants must file a written complaint with a video programming distributor in order to initiate a process to resolve captioning problems (on an *ad hoc* basis). Pursuant to the rules, video programming distributors are not required to respond to such complaints until 45 days after the end of the calendar quarter in which the complaint was received, or 45 days after the complaint was received, whichever is later. Complainants may not file captioning complaints with the Commission until 30 days after the time allotted for the video programming distributor to respond.<sup>14</sup> The onus of initiating enforcement proceedings to ensure implementation of the rules and to resolve captioning problems under the current rules is placed upon consumers, and the time-frame for resolving disputes under the rule is unduly lengthy.

As a result, based on communications Petitioners continue to receive from deaf and hard of hearing individuals, consumers continue to be frustrated in their efforts to resolve captioning problems in an efficient and expeditious manner. It is also difficult for deaf and hard of hearing individuals to track down the necessary information to contact the appropriate contact person for the relevant video programming provider or distributor in an effort to resolve such problems.<sup>15</sup> In the majority of cases, it is impossible for a television viewer of captions to independently determine the cause of the problem. To compound problems, video programming distributors

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<sup>14</sup> 47 C.F.R. § 79.1(g)(4).

<sup>15</sup> See e.g., Exhibit B1, June 6, 2002 e-mail complaint of Gretchen Butkus of Melbourne, Florida to the Northern Virginia Resource Center for Deaf and Hard of Hearing Persons concerning difficulty in reaching someone to address her captioning complaint; Exhibit B2, January 1, 2003 e-mail complaint of Joan Cassidy to the Northern Virginia Resource Center for Deaf and Hard of Hearing Persons concerning difficulty in finding the proper person to contact for the lack of captioning on the Hallmark Channel.

and providers often point fingers at one another and send complainants on a fruitless paper chase without making much (or any) effort to assist in remedying the captioning problems.<sup>16</sup>

### **3. Benchmark Captioning Audit Reports**

As discussed below,<sup>17</sup> the current captioning rules also do not require video programming distributors or providers to file with the Commission benchmark compliance audit reports. The absence of reporting and record-keeping requirements make it impossible for deaf and hard of hearing individuals or the Commission to monitor compliance (and noncompliance) with the required quarterly benchmark levels for captioning. As a result, it appears that currently there is very little monitoring of (and accountability for) meeting the required benchmark levels of captioning. As discussed below,<sup>18</sup> the complaint process under the current rules is not adequate to ensure that video programming distributors are complying with the benchmark captioning requirements.

### **4. Technical Quality Standards**

As discussed in greater detail below,<sup>19</sup> while the rules require video programming distributors to pass through captions of already captioned programs,<sup>20</sup> and require basic technical compatibility,<sup>21</sup> the rules do not include an effective mechanism for ensuring that video programming distributors and providers continuously monitor captioning and engineering

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<sup>16</sup> See Exhibit B3, May 10, 2002 Complaint of Lisa Tempesta. (An inquiry as to why “Sex in the City” and “The Sopranos” was not captioned was responded to by HBO that the problem was with the cable provider. The cable provider responded that the problem was with HBO.)

<sup>17</sup> See *infra* pp.12-16.

<sup>18</sup> See *infra* part II.

<sup>19</sup> See *infra* pp. 22-25.

<sup>20</sup> 47 C.F.R. § 79.1(c).

<sup>21</sup> 47 C.F.R. § 15.119.



equipment in order to avoid the occurrence of technical captioning problems in the first instance.<sup>22</sup> Technical problems continue to occur on a widespread basis, resulting in captioned programming being inaccessible to deaf and hard of hearing individuals (due to missing captions, garbled captions, and captions that disappear during portions of a program, for example).<sup>23</sup> Video programming distributors and providers apparently do not have sufficient incentive to diligently monitor captioning and their engineering equipment to prevent the occurrence of such technical problems.

The rules also do not require that edited or compressed captioned programming be reformatted in order to make the captions accessible to deaf and hard of hearing individuals (except where required in order for a distributor to meet its benchmark hours). As a result, deaf and hard of hearing individuals are foreclosed from access to programming that originally was captioned. Many programs are edited or compressed to fit within a specific time-frame, or edited in other manners which degrade the original captioning. As discussed below,<sup>24</sup> Petitioners submit that the Commission should revise its rules to require that edited or compressed programming be captioned in accordance with the mandates of Section 713.

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<sup>22</sup> The Commission has mandated that program distributors must take necessary steps to “monitor and maintain their equipment and signal transmissions” but has not enacted a system to ensure compliance with that mandate. See 13 FCC Red at 3369, ¶ 212.

<sup>23</sup> In the 2003 Report to the National Captioning Institute Foundation entitled “The State of Closed Captioning Services in the United States,” the Annenberg Public Policy Center of the University of Pennsylvania recommends ten areas in which captioning can be improved including “1. Address technical issues quickly, before video providers move to digital broadcasting and the 2006 mandate for 100 percent captioning is in place....6. Build quality control into the process of closed captioning.” See Exhibit C, “The State of Closed Captioning Services in the United States,” 2003 Report to the National Captioning Institute Foundation, at 45-46 (“2003 NCI Report”).

<sup>24</sup> See *infra* part III(C).

## **5. Non-Technical Quality Standards**

The Commission's rules currently do not include non-technical quality of service standards. The Commission committed to continue to review non-technical quality issues and revisit the issue if necessary after a period of implementation of the original captioning rules. As discussed herein, the time has come for the Commission to address non-technical quality issues and adopt captioning quality standards in order to ensure that deaf and hard of hearing individuals have full access to video programming as required by Section 713.

More than five years have passed since the Commission's captioning rules became effective. Less than two years remain until 100% captioning of new non-exempt programming will be required. However, without effective enforcement procedures, enhanced standards to ensure technical quality, and the adoption of non-technical quality standards, fulfillment of the mandates of Section 713 will remain illusory.

Based on the experience of deaf and hard of hearing individuals as communicated to Petitioners over the course of the past five years since the captioning rules were established, and based on the personal experience of Petitioners' principals, Petitioners believe that the time has come for the Commission to address enforcement and captioning quality issues in order to ensure that deaf and hard of hearing individuals have full access to captioning of video programming. Each of these issues is discussed in turn in greater depth below. Petitioners respectfully request that the Commission expeditiously initiate a rulemaking proceeding to address these issues in order to ensure a smooth transition to 100% captioning for new non-exempt programming in 2006 and to 75% captioning for pre-rule programming in 2008.

## **II. The Commission Should Establish Additional Compliance and Enforcement Measures**

Petitioners applaud the Commission's efforts to establish and implement the captioning rules to date. However, Petitioners submit that, in order to achieve the mandates of Section 713 of the Communications Act and better implement the requirements set forth in the Commission's captioning rules, additional enforcement and compliance measures must be adopted. Specifically, given that the Commission chose to place the responsibility for enforcement and compliance on captioning consumers through a complaint process, it is critical that the Commission establish the means to facilitate compliance monitoring and the reporting of complaints and to increase accountability for non-compliance.

### **A. The Commission Should Require Video Programming Distributors and Providers to Provide Contact Information, and Should Post Such Contact Information on the Commission's Website**

#### **1. Contact Information for Captioning Complaints**

In the experience of Petitioners' constituents since the captioning rules went into effect, deaf and hard of hearing individuals have difficulty in getting responses from the video programming industry regarding captioning technical quality issues and compliance with the captioning benchmarks. Based on communications that Petitioners have received from their constituents, it appears that deaf and hard of hearing consumers generally have little confidence in the ability of the current captioning enforcement and compliance provisions to bring about the resolution of captioning problems in a *timely and efficient manner*.

As discussed in comments filed in the Commission's captioning proceedings, captioning consumers experienced the same types of difficulties in resolving captioning problems prior to

adoption of the captioning rules.<sup>25</sup> In Petitioners' experience, the captioning rules to date generally have not adequately addressed the problems that captioning consumers experience, due in part to a lack of responsiveness of video programming providers and distributors to remedy such problems in a timely and efficient manner.

In order to ensure the effective implementation of the captioning mandates, Petitioners propose that the Commission establish procedures to make reliable contact information readily available to captioning consumers.<sup>26</sup> Specifically, Petitioners propose that the Commission require each video programming provider and distributor to provide the Commission with (and to post on their websites) the complete contact information for the person responsible for addressing captioning complaints and resolving captioning problems, including the contact person's name, address, TTY/toll-free telephone number, facsimile number, and e-mail address. The Commission also should establish an ongoing requirement that video programming distributors and providers update the contact information within seven days of any changes.

The Commission should maintain video programming distributor and provider contact information (and updates thereto) on its website. The Commission also should include on its website the name, address, TTY/toll-free telephone number, facsimile number, and E-mail address

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<sup>25</sup> See *Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility*, MM Docket No. 95-176, FCC 96-318, Report, 11 FCC Rcd 19,214 ¶¶ 89-93 (rel. Jul. 29, 1996) ("*FCC Report to Congress*").

<sup>26</sup> The Annenberg Public Policy Center of the University of Pennsylvania recommendation number six of ten is "Make it clear who audiences can contact and how. The Federal Communications Commission suggests that audiences with complaints first contact the network or cable company. Yet the industry interviews reveal that they receive very little feedback from audiences. Indeed, it was more often the captioning company, which sometimes provides a website or is a local entity, who gets the complaints. Offering the station's website, with a "link" for closed captioning, might begin a dialogue between audiences who use closed captioning and programmers that provide them." See Exhibit C, *2003 NCI Report*, at 45.

for the Commission contact person responsible for addressing captioning complaints. In addition, the Commission should require video programming distributors that send bills to customers to include on consumer bills (or via bill inserts) specific contact information for submitting captioning complaints. Video programming distributors and providers such as TV stations that broadcast directly and do not bill the customer should be required to provide such information by way of periodic public service announcements (in addition to white pages and yellow pages telephone directory advertising listing the TV stations' address and TTY/telephone numbers, as well as on their websites).

It is important that the Commission establish contact information requirements as outlined above in order to provide consumers with a practical mechanism to file complaints with video programming distributors and providers regarding captioning problems. Due in large part to the absence of this type of easily accessible contact information, consumers to date have been hindered in their efforts to resolve captioning problems in an efficient and timely manner.<sup>27</sup> Moreover, consumers continue to be frustrated by non-responsive video programming distributors and providers who simply "pass the buck" and leave to the complainant the burden of tracking down the source of captioning problems.

One recent example of the frustration that the current system engenders occurred when WPXW PAX-66 in Fairfax Station, Virginia stopped transmitting captioning with its programs. *See Exhibit B4.* The customer in question initially called her cable provider and informed it that captioning was not appearing on the particular station. Instead of first checking the station's feed to

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<sup>27</sup> The need for a single point of contact for complaints was a key issue identified by both consumers and captioning service providers at a recent Caption Quality Initiative Conference held on September 14, 2002 in Fairfax, Virginia. *See* Caption Quality Initiative Conference Report, September 14, 2002 available at: <http://tap.gallaudet.edu/CapQualReport.htm>

determine whether the problem was at the station level, the cable provider sent out a technician to ensure that the customer's connection was working.<sup>28</sup> After several more fruitless inquiries with the cable provider and hours of Internet research to determine whom to contact at the station, the customer managed to lodge a complaint with the appropriate person at PAX. Eleven days after the customer's initial complaint, the station finally determined that the problem was a "programming error in one of our satellite receivers not allowing it to pass the closed captioning."<sup>29</sup> Creating a better system for alerting the proper people of a captioning issue would benefit all parties by shortening the time-frames for resolution of similar problems.

Maintaining an efficient and updated system for consumers to contact providers will also serve to resolve problems without resulting to a formal complaint process. If a consumer has an effective way to alert a station that captioning is not being transmitted or is being transmitted improperly, the station will be in a better position to correct the situation in a timely manner. This will benefit both the consumer and the provider who will be in a better position to meet the captioning benchmarks. For example, if the provider is alerted at 8:00 p.m. that its captioning feature is not functioning, the provider may be able to resolve the issue prior to the 8:30 program. Therefore, only one half hour of programming would be lost as opposed to the possibility that an entire evening of programming would be lost due to a problem.

## **2. Captioning Complaint Form**

In order to enhance the enforcement/complaint procedures set forth in the captioning rules

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<sup>28</sup> In Petitioners' experience, customer service representatives of cable or satellite providers often attempt to blame the problem on the customer's failure to turn on the captioning feature on their television, even when the evidence precludes that from being the cause. Even after the customer explains that captioning is only missing on a particular channel and/or that other customers are having the exact same issues, service providers often insist that the problem is at the customer level.

and in turn, better ensure implementation of the captioning requirements, the Commission also should develop and make available on its website a standard captioning complaint form that may be used by consumers to file written complaints with the relevant video programming distributor/producer.<sup>30</sup> An example of such a form is attached hereto as Exhibit A. The form should be optional (*i.e.*, the complainant may prepare an E-mail or other communication in a different format providing the substance of the complaint) and should be made available on the Commission's website.

**B. The Commission Should Establish Compliance Reporting Requirements and Should Undertake Compliance Audits to Ensure Effective Implementation of the Captioning Requirements and to Improve Accountability**

**1. Benchmark Reporting Requirements**

The Commission previously elected not to establish specific record-keeping and public reporting requirements applicable to video programming distributors and providers.<sup>31</sup> Petitioners submit that, based on experience with captioning over the course of the past five years since the captioning rules went into effect, the lack of such benchmark reporting requirements has seriously hampered the effectiveness of the captioning rules and the ability of captioning consumers, their advocates, and the Commission itself to monitor compliance with the captioning rules.

Except for a limited number of cases (initiated by consumer complaints) which have revealed deficiencies in levels of benchmark captioning by some video programming distributors, the Commission and captioning consumers have no means of determining whether video programming distributors have complied with the captioning benchmarks for each channel, for each

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<sup>29</sup> See Exhibit B4, Response of David Linnemeyer, Chief Engineer of WPXW, to Diane Edge.

<sup>30</sup> The Commission has created consumer complaint forms in other contexts such as Form 475 (general telephone complaints) and Form 501 (Slamming complaints).

<sup>31</sup> *Report and Order*, 13 FCC Rcd at 3383, ¶ 244.

calendar quarter, since the rules went into effect on January 1, 1998. Indeed, it is not clear the extent to which video programming distributors themselves are keeping track of their compliance (or non-compliance) with the benchmark requirements.

One example of a case in which the video programming provider itself apparently did not know whether it was in compliance with the captioning benchmarks came about as a result of a complaint filed by a captioning consumer.<sup>32</sup> As a result of a complaint filed by Mr. Kelby Nathan Brick, it was revealed that Comcast Cablevision of Maryland, Inc. ("Comcast") failed to comply with the Commission's closed captioning requirements during the first and second quarters of the year 2000 on the Courtroom Television Network ("Court TV") station. According to the Commission's Order in that case, when Comcast contacted Court TV after receiving Mr. Brick's complaint, Court TV represented in a letter to Comcast that it was in compliance with the benchmark hours because it provided three hours of captioned programming daily (at that time, six daily hours of captioning was required). Comcast stated that it relied on Court TV's representation and relayed this information to Mr. Brick asserting that compliance with the benchmark requirements was being met on the Court TV channel distributed by Comcast. The Commission admonished Comcast, stating that, upon receiving information from Court TV indicating that only three hours of programming was captioned daily,

Comcast should have known that Court TV was not in compliance with the captioning rules. As a distributor of programming, Comcast is responsible for ensuring that the programming it distributes on its systems complies with the Commission's captioning requirements. It failed to do so here.<sup>33</sup>

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<sup>32</sup> See Kelby Nathan Brick v. Comcast Cablevision of Maryland and Courtroom Television Network, Request for Compliance with the Closed Captioning Requirements, *Memorandum Opinion and Order*, DA 02-45 (rel. Jan. 11, 2002) ("*Comcast Order*").

<sup>33</sup> *Id.* at 4.



Comcast's failure to self-monitor compliance may be pervasive in the video programming industry, but without public benchmark reporting requirements, such problems are revealed and confirmed on an *ad hoc* basis, if and when a captioning consumer suspects a problem with compliance, and then only after a lengthy, onerous complaint process. During the protracted complaint process (first at the distributor level, then at the Commission level), which under the Commission's rules can take many months, consumers are without the required benchmark level of captioning for those stations.

Petitioners fear that the lack of a benchmark reporting requirement has created a situation where many providers are unaware that they are out of compliance with the benchmarks. As we approach the January 1, 2006 deadline for 100 percent captioning of new non-exempt programming, Petitioners believe that it is vital for providers to come into full compliance with the benchmarks. Even after the January 1, 2006 deadline, when all new non-exempt programming must be captioned, the creation of a benchmark reporting requirement would assist in the determination of whether providers are in compliance with the Commission's benchmarks for pre-rule non-exempt programming and for Spanish-language programming. Creating a system whereby video program providers must audit themselves and report on their compliance with the benchmarks is the most efficient and effective way to ensure that captioning is available at the levels mandated.

It is noteworthy that the Commission did not impose any penalties, sanctions, or other remedial measures as a result of the complaint against Comcast (in part because Court TV had on its own increased the number of captioned hours beyond the required benchmark amount).<sup>34</sup> As a result, the *Comcast Order* does not provide much incentive for other video programming providers

to self-audit their own compliance with the benchmarks. Affirmative reporting requirements are necessary to better ensure compliance and accountability and to assist captioning consumers and the Commission in monitoring compliance on an ongoing basis.

At this point in time, six years into the captioning phase-in period (and only two years away from the 100% captioning requirement for all new non-exempt programming), and in light of the general lack of information regarding benchmark compliance to date, it is of critical importance to the implementation and enforcement of the captioning rules that the Commission establish compliance reporting requirements. Specifically, the Commission should revise the captioning rules to require video programming distributors and providers to file with the Commission (and to make available on their websites) captioning compliance reports, on a quarterly basis, within 30 days following the end of the previous quarter, to be maintained and accessible on the Commission's website. This would allow captioning consumers to assist the Commission in efforts to ensure compliance with the captioning requirements.

In the absence of such reporting there is no mechanism by which captioning consumers may verify whether particular video programming distributors and providers are in compliance with the captioning requirements during the phase-in period (and after 2006 for pre-rule non-exempt programming and Spanish-language programming), except perhaps by filing a complaint and requesting that the video programming provider disclose such documentation. The burden should not be placed on consumers in this manner. Consumers should not be required to attempt to extract compliance information from video programming providers on a case-by-case basis. This type of piecemeal monitoring resulting from *ad hoc* customer complaints does not and cannot lead to

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<sup>34</sup> The Commission determined that, "[a]s there has been a successful, albeit delayed, effort to comply with the captioning requirements, penalties, sanctions or other remedial measures are not

consistent effective enforcement and accountability throughout the video programming industry. Moreover, an audit reporting requirement will assist in ensuring a smooth transition toward 100 percent captioning of new non-exempt programming by January 1, 2006, and with 75 percent of pre-rule programming by January 1, 2008.

## **2. Benchmark Compliance Audits**

In addition to establishing (going forward) compliance reporting requirements as discussed above, the Commission should (1) conduct compliance audits to determine the level of compliance (or non-compliance) by video programming distributors, (2) publish the results of such audits, and (3) take enforcement action where warranted by non-compliance. When the Commission elected not to adopt benchmark compliance reporting requirements, it stated that it would conduct compliance audits.<sup>35</sup> However, Petitioners are unaware of any Commission actions to conduct such audits. The lack of compliance audits and compliance reporting requirements seriously undermines enforcement of the captioning rules and the effectiveness of the captioning rules.

Petitioners submit that the adoption of compliance reporting requirements as outlined above, in addition to Commission auditing to determine non-compliance with the benchmark requirements, will help ensure a smooth transition toward 100 percent captioning of new non-exempt video programming by 2006 as well as the benchmark for pre-rule programming. By auditing current and past compliance now, the Commission may discover benchmark noncompliance, and will be in a better position to require distributors to remedy failures to meet the benchmark going forward (in addition to requiring increased captioning hours and imposing other penalties as warranted). In so doing, the Commission will assist the video programming

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warranted at this time.” *Id.* at 5.

<sup>35</sup> *Order on Reconsideration*, 13 FCC Rcd at 20030, ¶ 126.

industry to come into compliance as required in the timetable, rather than waiting until 2006 for the industry to discover problems and then claim that they do not have enough time and/or resources to come into compliance with 100% captioning by 2006.

**C. The Commission Should Revise its Complaint Rules to Require Responses to Consumer Complaints Regarding Captioning Quality Issues (and Other Issues Not Directly Tied to Benchmark Compliance) Within 30 Days**

Under the current rules, video programming distributors are not required to respond to a complaint about captioning problems (including technical captioning problems) until 45 days after the end of the prior calendar quarter or 45 days after receipt of the written complaint, whichever comes later. Accordingly, if a consumer encounters technical problems with missing captions on January 1<sup>st</sup> and immediately files a written complaint with the relevant video programming distributor, the video programming distributor is not required to respond until May 15<sup>th</sup>. Four months could pass before the video programming provider is legally required to respond, and in the interim, the consumer would continue to suffer from the lack of access to the relevant video programming.

The problem is compounded when these consumer are paying the high costs of cable, satellite, or other distribution services, but are not receiving captioned programming, so that in effect they have no access to the services for which they are paying premium prices. Unfortunately, based on correspondence that Petitioners have received from consumers regarding these issues, this happens far too often. In many parts of the country, consumers do not have any alternative choices of cable, satellite or other distributor but instead have only one option (and cannot receive broadcast programming without such a service). Particularly in the absence of alternative sources for receiving video programming (and even where such competition exists), the distributors in many cases apparently do not feel any market pressures to quickly remedy such problems.

In light of the problems that captioning consumers continue to experience with respect to non-responsiveness to captioning complaints and the difficulty in resolving captioning complaints expeditiously and efficiently, the Commission should revise the complaint procedures set forth in Rule 79.1(g) to establish two categories of complaints: (1) complaints regarding the number of hours captioned in a quarter (to which the video programming distributor may wait to respond until 30 days after the end of the relevant calendar quarter or 30 days after the complaint is filed, whichever is later) and (2) complaints regarding other captioning issues not related to the number of benchmark hours (including, but not limited to technical problems resulting in missing captions or garbled captions, for example) to which the video programming distributor must respond within 30 days after the complaint is filed. Particularly given that the types of technical problems have not changed or improved since the Commission's *1996 Report to Congress*, the rules must be revised to strengthen enforcement and compliance, including the creation of a shortened complaint response time-frame, at a minimum with respect to technical quality issues.<sup>36</sup>

**D. The Commission Should Establish Fines/Penalties for Non-Compliance with the Captioning Rules**

In order to ensure full access to video programming as required by Section 713 of the

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<sup>36</sup> In the *Order on Reconsideration*, the Commission recognized that its decision to allow video programming distributors to respond to a complaint within 45 days of the end of the quarter or after the complaint is filed "is premised on the complaint being related to the compliance with the quarterly benchmarks. In order to avoid confusion for both video programming providers [sic] and consumers, however, we will apply the same time table even to those alleged violations that are not tied to quarterly compliance benchmarks." *Order on Reconsideration* at 20025, ¶ 116. Petitioners submit that this system has not worked effectively and that the Commission should create a shorter response time for complaints that are not related to quarterly compliance benchmarks. Shortening the time frame by which distributors must respond to complaints not related to the number of captioned hours (such as technical problems) will better ensure enforcement of the rules and the timely and efficient resolution of captioning problems. Petitioners believe that the industry and consumers have become familiar with the concept of quarterly benchmarks and there is little chance that differentiating between benchmark related complaints and non-benchmark related complaints will create any confusion.

Communications Act, the Commission should establish additional enforcement measures, including punitive measures such as specific fines, for noncompliance with the Commission's captioning rules.<sup>37</sup> Specifically, Petitioners propose that the Commission establish a base forfeiture amount for violations of the captioning benchmark requirements. Such a forfeiture would create a financial incentive for video programming distributors or providers to comply with the Commission's benchmarks. Petitioners suggest that the base forfeiture amount for violation of the benchmark captioning requirements be set at \$8,000 per violation, with each hour of programming below the applicable benchmark being counted as a separate violation.<sup>38</sup> (In January 2006 when 100 percent captioning is required for new non-exempt video programming, the \$8,000 fine should apply for every hour of new programming that is not captioned.) The establishment of a system of punitive penalties is necessary to ensure compliance as the benchmark levels increase.

Experience has shown that the marketplace will not ensure compliance with the captioning benchmarks. Even as new more technically-advanced methods of transmitting programming, such as digital television, become more prevalent, evidence indicates that the marketplace has failed to ensure compliance with captioning requirements. A recent nationwide sampling of locally broadcast digital television programming conducted by the WGBH National Center for Accessible Media ("NCAM"), showed that 35% of local digital television stations failed to provide any closed captioning and only 20% provided captions in compliance with the Commission caption decoder rules (47 CFR Section 15.122), even though Commission rules now apply equally to digital

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<sup>37</sup> Currently, the Commission generally wields the threat of potential increased captioning requirements beyond the benchmarks for noncompliance. See, e.g., *Comcast Order* at 5, n.32; 47 C.F.R. § 79.1(b)(8).

<sup>38</sup> The suggested base forfeiture amount of \$8,000 is akin to the Commission's current forfeiture amount for violation of the Commission's children's television programming requirements.

broadcasts and require that at least 75% of new non-exempt programming be captioned as of January 1, 2004.<sup>39</sup>

In light of the apparent failure of some programming distributors or providers to affirmatively audit their programming to determine compliance with the Commission's benchmarks, Petitioners fear that the frequency of non-compliance will increase as the Commission's benchmarks increase. Accordingly, increased enforcement measures are required to provide incentives for the regulated industry to comply with the rules and to ensure captioning quality, reliability, and availability.

### **III. The Commission Should Revise its Captioning Rules to Specify Procedures and Mechanisms for Ensuring Technical Quality**

#### **A. The Current Rules Do Not Ensure Technical Quality for Closed Captioning**

In the 1997 *Report and Order*, the Commission noted that technical captioning quality is addressed by Rule Sections 15.119 (technical requirements for transmission and display of closed captioning to assure basic technical compatibility among captioning services) and 76.606 (which requires cable companies to pass through captioning intact).<sup>40</sup> However, in light of reported problems with captioning not being transmitted properly, the Commission stated that it would "adopt and enforce a rule to ensure that captioned programming is always delivered to viewers complete and intact. This rule, Section 79.1(c) is an extension of the existing provision of the cable rules that requires cable operators to deliver existing captions intact."<sup>41</sup> Petitioners applaud the

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<sup>39</sup> NCAM also notes that although some High Definition versions of pay cable and satellite services offer regular closed captioning, many of the new cable and satellite High Definition channels (such as INHD, HDNet, Discovery HD and national/regional sports networks) offer no captioning, even when their program content has been captioned for other, analog, distribution channels.

<sup>40</sup> 47 C.F.R. § 15.119 and 47 C.F.R. § 76.606.

<sup>41</sup> *Report and Order*, 13 FCC Rcd at 3368, ¶ 211.